



Odera & 6 others (Suing on Their Own and on Behalf of all other Members of the Kogony Community Claiming Registerable Interests in the land known as C/18 Scheme) v Akinyi & 5 others; Oim & 18 others (Interested Party); G.N.Otieno & 4 others (Applicant) (Environment and Land Case Civil Suit 146 of 2012) [2024] KEELC 3493 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3493 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 146 OF 2012
SO OKONG'O, J
APRIL 24, 2024

BETWEEN

- CHRISTABEL ACHIENG ODERA 1ST PLAINTIFF**
- WILSON OGOLA ODENY 2ND PLAINTIFF**
- CARRILUS OLANDO ODARI 3RD PLAINTIFF**
- JOSEPH OMOLLO 4TH PLAINTIFF**
- FLORENCE ATIENO ADERA 5TH PLAINTIFF**
- JOHN OKONGO OGENDO 6TH PLAINTIFF**
- MICHAEL JUMA ADEDE 7TH PLAINTIFF**

SUING ON THEIR OWN AND ON BEHALF OF ALL OTHER MEMBERS OF THE KOGONY COMMUNITY CLAIMING REGISTERABLE INTERESTS IN THE LAND KNOWN AS C/18 SCHEME

AND

- CHRISTOPHER JUMA AKINYI 1ST DEFENDANT**
- AUGUSTINE GENGA ONDINGO 2ND DEFENDANT**
- VITALIS OURU AKINYI 3RD DEFENDANT**
- JANE KAMBAGA 4TH DEFENDANT**
- COUNTY LANDS REGISTRAR 5TH DEFENDANT**
- HON.ATTORNEY GENERAL 6TH DEFENDANT**

AND



DAVID ODERA OIM &18 OTHERS INTERESTED PARTY

AND

GEORGE G.N.OTIENO APPLICANT

AUMA ABUORO APPLICANT

WILLIAM AMAYI APPLICANT

RICHARD LEONARD MASIME OGOLA APPLICANT

JAMES MASWACHE APPLICANT

RULING

Background

1. In their further amended Plaint dated 8th November 2019 filed on 11th November 2019, the Plaintiffs averred that they were members of Kogony Community who belonged to seven sub-clans of Kokwe, Koyola, Konyango, Kodongo, Kosina, Katuk and Kanyamedha all within Kogony Sub-Location. The Plaintiffs averred that they had been residing in and around and were entitled to all that parcel of land lying between Kogony and Kanyakwar adjudication sections which had been registered and was comprised in Survey Map or Diagram No.18. The Plaintiffs averred that the said parcel of land (hereinafter referred to only as “the suit property”) was referred to in some official records as Parcel Nos. Kisumu /Kogony/5000-6012.
2. The Plaintiffs averred that in 1978, the suit property was inadvertently included in the Kenya Gazette Notice through which part of the land in Kanyakwar had been acquired compulsorily by the government. The Plaintiffs averred that when this mistake was noted and corrected, the suit property was not immediately adjudicated and the same remained as an open space between Kogony and Kanyakwar adjudication sections. The Plaintiffs averred that the suit property was neither demarcated nor surveyed. The Plaintiffs averred that the suit property was community land and that the same was inherited by the Plaintiffs from their ancestors. The Plaintiffs averred that in 2011, a decision was made by the District Land Adjudication and Settlement Officer that the suit property should be adjudicated and returned to the original families that owned it. The Plaintiffs averred that they elected officials to carry out this exercise on their behalf. The Plaintiffs averred that among the persons who were elected for that purpose were the 1st, 2nd and 3rd Defendants.
3. The Plaintiffs averred that the 1st, 2nd and 3rd Defendants assured the Plaintiffs that the suit property would be adjudicated and registered in the names of the Plaintiffs. The Plaintiffs averred that the 1st, 2nd and 3rd Defendants in breach of their duties colluded with the 4th Defendant and the District Land Registrar, Kisumu and caused all parcels created from the suit property to be registered in the names of a few individuals including the 1st, 2nd and 3rd Defendants. The Plaintiffs averred further that the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants fraudulently caused some of the parcels of land created from the suit property to be registered in the names of persons who were not members of the Kogony community. The Plaintiffs sought judgment against the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants for:
 - a. General Damages;



- b. A declaration that the suit property comprising but not limited to land parcel Nos. Kisumu/Kogony/5000-6012 be declared the Plaintiffs' ancestral land and that the same should revert to the Plaintiffs;
 - c. An order that all the titles arising from the suit property which were issued to the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants and /or any other third parties be nullified and cancelled;
 - d. An order that all the remaining parcels of land forming part of the suit property which had not been transferred or alienated be equitably and justly shared between (and distributed to) all the beneficiaries entitled to the same including the Plaintiffs;
 - e. An order that the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants do render true and accurate accounts of their dealings with all the parcels of land forming part of the suit property and further that they do jointly and severally account to all the Plaintiffs for all the proceeds of the sale of any of the parcels which they had sold out of the suit property; and
 - f. Costs of this suit plus interest thereon.
4. The 1st, 2nd, 3rd and 4th Defendants filed a joint amended statement of defence on 11th July 2017 in which they denied the allegations made against them by the Plaintiffs. The 1st, 2nd and 3rd Defendants denied that they colluded with the 4th Defendant and the District Land Registrar, Kisumu to register the parcels of land that arose from the adjudication and demarcation of the suit property in the names of a few individuals including them. The 1st, 2nd and 3rd Defendants denied that there existed a fiduciary relationship between them and the Plaintiffs. The 1st, 2nd and 3rd Defendants denied having breached such duty as alleged. The 1st, 2nd and 3rd Defendants also denied the particulars of fraud pleaded against them in the amended plaint. The 5th and 6th Defendants filed a joint statement of defence on 10th January 2020. The 5th and 6th Defendants denied the Plaintiffs' claim in its entirety.
 5. The court heard the suit and delivered a judgment on 18th March 2022. In the judgment, the court framed the following issues for determination;
 1. Whether the suit property was community land;
 2. Whether there was fraud on the part of the Defendants; and
 3. Whether the Plaintiffs were entitled to the orders sought.
 6. In the said judgment, the court found that the suit property was community land and that the 1st, 2nd, 3rd and 4th Defendants were appointed as leaders to act on behalf of the members of the Kogony Community to ensure that the suit property was demarcated, registered and titles issued in the names of the members of the community. The court found that the Defendants fraudulently registered the parcels of land that were created from the suit property in the names of persons who were not members of the community and had sold some of the parcels to third parties. Based on the said findings, the court entered judgment for the Plaintiffs against the Defendants for:
 - a. General damages of Kshs.10,000,000/=.
 - b. A declaration that all that block of land registered and comprised in Map Sheet or Diagram No. 18 and which was referred to as Kogony C-18 Scheme and comprising but not limited to land parcel Nos. Kisumu/Kogony/5000-6012 was the Plaintiffs' ancestral land and the same should revert to the Plaintiffs.



- c. An order that all the titles deeds forming part of the said Kogony C-18 Scheme and which were issued to the 1st, 2nd, 3rd and 4th Defendants and /or any other third parties be nullified and cancelled.
- d. An order that all the remaining parcels of land forming part of the said Kogony C-18 Scheme which had not been transferred or alienated be equitably and justly shared between (and distributed to) all the beneficiaries entitled to the same including the Plaintiffs.
- e. An order that the 1st, 2nd, 3rd and 4th Defendants do render true and accurate accounts of their dealings with all the parcels of land forming part of Kogony C-18 and further that they do jointly and severally account to all the Plaintiffs for all the proceeds of the sale of any of the parcels which they had sold out of the said Kogony C-18 Scheme.
- f. Costs of this suit plus interest thereon.

The Application Before the Court

7. What is now before me is an application brought by the Applicants under Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* and Order 1 Rule 10(2), Order 22 Rule 22 and Order 51 Rules 1 and 15 of the *Civil Procedure Rules*. In the application, the Applicants have sought the following orders;
 1. That the judgment of this court dated 18th March 2022 together with all consequential proceedings be set aside and the hearing of the suit do commence a fresh.
 2. That the Applicants be joined in the proceedings as the 7th, 8th, 9th, 10th, 11th and 12th Defendants and the plaint to be amended accordingly and be served upon all the parties.
 3. The costs of the application be provided for.
8. The application which is supported by the affidavit of the 1st Applicant was brought on several grounds. In summary, the Applicants contended that they were the *bona fide* registered owners respectively of the parcels of land known as Kisumu/Kogony/5102, 5123, 5136, 5565 and 5705 located within Registry Index Map Sheet No. 18, Kogony Registration section, Kisumu County (hereinafter together referred to as “the Applicants’ land” and individually as “Plot Nos. 5102, 5123, 5136, 5565 and 5705”). The Applicants averred that they acquired the Applicants’ land innocently through purchase before the institution of this suit and without notice of any dispute over the same. The Applicants averred that they were not aware of the existence of this suit until mid-2023 when they came across a judgment delivered in the suit in Kisumu J.R No. 4 of 2023 which was mentioned together with ELC J.R No. 1 of 2023 in which the Applicants were parties. The Applicants averred that the two judicial review applications were brought to challenge the decision of the Kisumu Land Registrar to cancel the titles of the Applicants which originated from Registry Index Map Sheet No. 18, Kogony Registration section, Kisumu County which was the subject of this suit. The Applicants averred that it was in the said proceedings that they came across the judgment that was made in this suit which cancelled their titles. The Applicants averred that they were never parties to this suit and were not made parties to the suit before the said judgment of 18th March 2022 that cancelled their titles. The Applicants averred that since they were the registered proprietors of the Applicants’ land before this suit was filed, they should have been made parties to the suit so that they could be heard before the prejudicial orders were made against them.
9. The Applicants averred that in proceeding with the suit in the absence of the registered owners of the Applicants’ land and having the titles for the said parcels of land cancelled without hearing the Applicants violated the rules of natural justice and the rights of the Applicants guaranteed under



Article 47 of the Constitution. The Applicants averred that the judgment of the court delivered herein needed to be set aside, the Applicants joined in the suit and the hearing of the suit commenced afresh. The Applicants annexed several documents in their affidavit in support of the application.

10. The Applicants' application was opposed by the Plaintiffs through a replying affidavit sworn by the 1st Plaintiff on 23rd January 2024. The Plaintiffs averred that the original owner of land parcel No. Kisumu/Kogony/ 2409, one, John Okeyo Donde subdivided the said parcel of land into two portions namely; Kisumu/Kogony/ 4616 and 4617. The Applicants averred that the said John Okeyo Donde sold parcel No. Kisumu/Kogony/ 4617 to the 1st Defendant. The Plaintiffs averred that the 1st Defendant subdivided parcel No. Kisumu/Kogony/ 4617 into 29 portions among them Kisumu/Kogony/ 5102, 5123, 5136, 5565 and 5705(the Applicants' land) claimed by the Applicants. The Plaintiffs averred that the Applicants' land were subdivisions of land parcel No. Kisumu/Kogony/ 4617 originally owned by the 1st Defendant. The Applicants averred that the said parcels of land had nothing to do with the ancestral land that was being claimed by Kogony Community which had not been surveyed, demarcated and adjudicated upon. The Plaintiffs averred that the purported subdivision of land parcel No. Kisumu/Kogony/ 2409 which gave rise to the Applicants' land was fraudulent and the court found as much in the impugned judgment. The Plaintiffs averred that the parcel of land that was the subject of this suit had no relationship with the Applicants' land which was initially owned by the 1st Defendant. The Plaintiffs averred that no title had been processed as of 2011 for the community land that was the subject of this suit and as such the titles held by the Applicants that were issued in 2010 must have originated from another parcel of land separate and distinct from the community land. The Plaintiffs averred that in any event, the Applicants were all along aware of the existence of this suit since the 1st Defendant who was the original owner of the Applicants' land was a party to the suit. The Plaintiffs annexed to their affidavit several documents.
11. The application was argued by way of written submissions. The Applicants filed submissions dated 15th February 2024. In their submissions, the Applicants reiterated the grounds set out on the face of the application and the affidavit filed in support of the application. The Applicants submitted that the impugned judgment declared the land under Registry Index Map Sheet No. 18, Kogony Registration section, Kisumu County community land owned by the Kogony community and ordered the cancellation of the titles that had been issued to the Defendants which included the titles for the Applicants' land.
12. The Plaintiffs filed submissions dated 22nd March 2024. The Plaintiffs submitted that they had demonstrated that the Applicants' land had its origin in land parcel No. Kisumu/Kogony/4617 owned by the 1st Defendant which parcel of land was not the subject of this suit and the judgment of the court. The Plaintiffs reiterated that their claim was not over land parcel No. Kisumu/Kogony/4617. The Plaintiffs submitted that the Applicants were not necessary parties to this suit and as such there was no legal basis for joining them in the suit since the Plaintiffs had no claim against them.
13. The Plaintiffs submitted that the 1st and 3rd Applicants who claimed to be the owners of Plot No. 5102 did not produce any evidence in support of the claim. The Plaintiffs submitted that in any event, Plot No. 5102 was a subdivision of land parcel No. Kisumu/Kogony/4617 and at the trial, the 1st Defendant had maintained that the said parcel of land belonged to him and that it had no relationship with the community land that was being claimed by the Plaintiffs. The Plaintiffs submitted further that there was no evidence as to when Plot No. 5102 was registered in the name of the 1st and 3rd Defendants. The Plaintiffs submitted that there was a likelihood that the registration offended the doctrine of *lis pendens*. The Plaintiffs submitted that the orders sought by the Applicants were discretionary and that no proper basis had been laid to warrant the grant of the same.



Analysis and Determination

14. I have considered the Applicants' application together with the affidavit filed in support thereof. I have also considered the replying affidavit by the Plaintiffs and the submissions by the advocates for the parties. The Applicants have sought to set aside the judgment delivered herein on 18th March 2022 on the ground that the said judgment affected them while they were neither parties to the suit nor aware of the suit. The Applicants have contended that the court in the said judgment cancelled the titles held by them for the Applicants' land without hearing them. From the documents annexed to the supporting affidavit, Plot No. 5102 is registered in the name of 4th Defendant, Plot No. 5123 is registered in the name of the 2nd Applicant, Plot No. 5136 is registered in the name of the 4th Applicant, Plot No. 5565 is registered in the name of the 5th Applicant while Plot No. 5705 is registered in the name of one, Nereah Awino Ochieng who is not a party to the application before the court. The said parcels of land were registered in the names of the said persons on 9th April 2010, 10th December 2010, 10th December 2010, 22nd December 2010 and 7th June 2011 respectively. The 2nd, 4th and 5th Applicants have demonstrated that they were the registered owners of Plot Nos. 5123, 5136, and 5565 at the time this suit was filed in 2012. The title deeds annexed to the Applicants' affidavit in support of the application show that the Applicants' properties are all located within Registry Index Map Sheet No. 18. In the impugned judgment of this court, the court declared that all land comprised in the Registry Index Map Sheet No. 18 which included land parcel Nos. Kisumu/Kogony/5000 to 6012 were the Plaintiffs' ancestral land and that the same should revert to the Plaintiffs. The court also cancelled all the title deeds that had been issued to the Defendants and other third parties in respect of land that was falling within the Registry Index Map Sheet No. 18.
15. Although the Plaintiffs have denied it, there is no doubt from the foregoing that the Applicants' land was affected by the impugned judgment. The Applicants' land was declared to belong to the Plaintiffs and the title deeds held by the Applicants were cancelled. As I have mentioned, when the Plaintiffs brought this suit, the 2nd, 4th and 5th Applicants were already registered as the proprietors of their respective parcels of land. The 2nd, 4th and 5th Applicants had a right in the circumstances to be heard before their parcels of land were declared to belong to the Plaintiffs and their title deeds cancelled. It is therefore my finding that the 2nd, 4th and 5th Applicants were condemned unheard in violation of the rules of natural justice. The 2nd, 4th and 5th Applicants have therefore made out a case for the setting aside of the impugned judgment to the extent that affected their rights. As for the 1st Applicant, what he had placed before the court is an agreement of sale between him and the 4th Defendant. There is no evidence that Plot No. 5102 was transferred and registered in his name. The Plaintiffs could not have known therefore that he had any interest in the property to warrant being joined in the suit considering that the 4th Defendant who was the registered owner of the property was already a party to the suit. Concerning the 3rd Applicant, there is no material before the court showing that he has an interest in any of the parcels of land the subject of the present application.

Conclusion

16. In conclusion, the application dated 2nd September 2023 succeeds only in respect of the 2nd, 4th and 5th Applicants. On the suitable orders to make, I will not set aside the entire judgment of the court. The Defendants and the Interested Parties who participated in the hearing of the suit and are bound by the said judgment have not challenged the same before this court. It would not be appropriate to disturb the judgment as far as the rights of the Plaintiffs and the Defendants settled by the said judgment are concerned. For that reason, I hereby review and vary the judgment delivered herein on 18th March 2022 and strike out there from any reference to the land parcel Nos. Kisumu/Kogony/5123, 5136, and 5565



owned by the 2nd, 4th and 5th Applicants who were not parties to the suit. For the avoidance of doubt, the said judgment shall not in any way affect the creation and ownership of land parcel Nos. Kisumu/Kogony/5123, 5136 and 5565. Either party (the Plaintiffs or the 2nd, 4th and 5th Defendants) shall be at liberty to institute a fresh suit for the determination of any dispute that may be pending or arising over the ownership of the said parcels of land. Each party shall bear its costs of the application.

DELIVERED AND DATED AT KISUMU THIS 24TH DAY OF APRIL 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Nyakiangana for the Plaintiffs

N/A for the Defendants

N/A for the Interested Parties

Ms. Omondi h/b Mr. Odeny for the Applicants

Mr. Oguta-Court Assistant

